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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

FRED ARMBURG

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED OCTOBER 20, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,291)

( )

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[fols. 1 & 2] COMMONWEALTH OF MASSACHUSETTS:

IN MUNICIPAL COURT OF CITY OF BOSTON

JUDGMENT

At the Municipal Court of the City of Boston, holden at said Boston, within the County of Suffolk, for civil business, on the first day of March, A. D. 1930.

FRED ARMBURG, Plaintiff,

vs.

BOSTON AND MAINE RAILROAD, Defendant

the Plaintiff appears and enters his action in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the sheriffs of our several counties or their deputies or any constable of any city or town within our said Commonwealth, Greeting:

We command you to attach the goods or estate of Boston and Maine Railroad, a corporation duly established under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston, in our County of Suffolk, to the value of Sixty Thousand Dollars; and summon the said Defendant (if it may be found in your precinct,) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the first day of March, A. D. 1930, at nine of the clock in the forenoon; then and there to answer to Fred Armburg, of Acton, in the County of Middlesex, in an action of tort, to the damage of the said Plaintiff (as he says) the sum of Sixty Thousand Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

[L. s.]

Witness, Wilfred Bolster, Esquire, at Boston aforesaid, the Tenth day of February, in the year of our Lord one thousand nine hundred and thirty.

William F. Donovan, Clerk.

[fols. 3 & 4] Upon which is the following, to wit:

Officer's Return

"MIDDLESEX, ss:

February 14, A. D. 1930.

By virtue of this writ, I this day attached a chip as the property of the within-named defendant corporation, Boston and Maine Railroad, and summoned it to appear and answer at Court by giving an attested copy, together with a summons, of this writ in hand to C. N. Marland, its treasurer, and the officer in charge of its business.

Fees:

Copy	.50
Service	1.00
Travel	.30
	$1.80

Chester M. Ricker, Deputy Sheriff."

And the further consideration of said action is thence adjourned to the fourth day of March, A. D., 1930. And on said fourth day of March, said defendant files its Answer.

And the further consideration if said action is thence continued or adjourned from time to time until the ninth day of April, A. D. 1930.

And on the ninth, tenth and eleventh day of said April Trial.

Defendant files request for rulings, and action was continued for advisement, Zottoli, J., and on April 14, A. D. 1930, Court finds for plaintiff in $26,500—Memo. of rulings filed.

April 16, A. D. 1930, Defendant files request for report.

April 18, A. D. 1930, Defendant files Draft Report.

May 3, A. D. 1930, Report filed and allowed.

May 26, A. D. 1930, Arguments on report before the Appellate Division. Decision reserved.

June 27, A. D. 1930, Opinion and final order of Appellate Division filed. Report dismissed.

July 1, A. D. 1930, Defendant files Claim of Appeal to Supreme Judicial Court.

July 3, A. D. 1930, Defendant files request that record be prepared for the transmission of appeal.

July 3, 1930, costs of preparing record for transmission of appeal estimated at $125, and notice thereof sent to Defendant.

July 8, 1930, Defendant deposits $125 to perfect appeal.

July 28, 1930, Defendant notified as to readiness of papers for entry in Supreme Judicial Court.

July 29, 1930, Copies, etc., delivered to defendant for entry in Supreme Judicial Court.

September 15, 1931, Rescript received from Supreme Judicial Court, order dismissing report affir-ed.

September 16, 1931, Agreement to continue one week for Judgment filed.

September 22, 1931, Defendant files motion for stay of execution.

It is therefore considered by said Court, that he the said Plaintiff recover against the said Defendant for the sum of twenty-eight thousand eight hundred and one dollars and one cent damage, and costs of suit, taxed at ninety-two dollars and forty cents.

Judg't date: Sept. 25, 1931.

Dam.	$28,801.01
Costs	92.40
	$28,893.41

Attest:

William F. Donovan, Clerk.

A true copy.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Municipal Court of the City of Boston, at Boston, the twenty-fifth day of September, in the year of our Lord one thousand nine hundred and thirty-one.

William F. Donovan, Clerk. (Seal The Municipal Court of the City of Boston.)

[fol. 5] IN MUNICIPAL COURT OF THE CITY OF BOSTON

FRED ARMBURG

v.

BOSTON AND MAINE RAILROAD

Report—Filed May 3, 1930

STATEMENT OF CASE

This is an action of tort at common law brought by a writ dated February 10, 1930 in which the plaintiff seeks to recover damages for injuries sustained by him on July 8, 1929, while he was traveling in the course of his employment by the defendant as a section hand upon a railroad motor car which was being operated over the tracks of the Boston and Maine Railroad in the Town of Acton by another employee of the defendant named Connell.

The defendant's answer is a general denial and, in addition to setting up the defences of contributory negligence and assumption of risk on the part of the plaintiff, sets up the defence that the plaintiff's injuries were due solely to the negligence of a fellow servant.

The pleadings may be referred to and are hereby made a part of this report.

At the trial the defendant contended that the Massachusetts Workmen's Compensation Act, G. L. c. 152, did not apply to the defendant which at the time of the accident was, and is now, a railroad corporation engaged in both intra- and inter-state commerce; that G. L. c. 152, § 66 was not applicable to the defendant and that the defence that the plaintiff's injury was caused by the negligence of a fellow servant was open to the defendant in this action and constituted a complete defence thereto; and further, that if said Massachusetts Workmen's Compensation Act, G. L. c. 152, should be construed as being applicable to the defendant then said G. L. c. 152 § 66 would be unconstitu-
[fol. 6] tional on the ground that it violated the Commerce clause contained in Article I, Sect. 8 of the Constitution of the United States by imposing an undue burden upon interstate commerce.

Without admitting that it came within the provisions of that Act, it was admitted by the defendant corporation at the trial that it was not then and was not at the time of the plaintiff's injury a subscriber under the provisions of the Massachusetts Workmen's Compensation Act now contained in General Laws, c. 152.

It was admitted by the plaintiff, Armburg, at the trial that the defendant was at the time of the plaintiff's injury a common carrier of freight and passengers for hire; that it either owned or leased railroad tracks which it used in its business, which tracks extend from point to point within the state of Massachusetts, and also from points in Massachusetts to points in the states of Maine, New Hampshire, Vermont and New York; and that the defendant corporation was at the time of the plaintiff's injury engaged in the business of transporting both freight and passengers over its tracks from point to point within this state and also from points within this state to points in other states, and from points in other states to points in this state. It was also agreed at the trial between the parties that the plaintiff was not employed in interstate commerce at the time of his injury but was then engaged in intrastate commerce.

At the trial there was also evidence tending to show the following:

The accident happened at about 7:00 A. M. on the morning of July 8, 1929. The plaintiff, Armburg, was then employed by the Railroad as a section hand, and he and the other members of his section crew had reported for work at the section house at West Acton and at the time of the accident were being transported to their place of work at South Acton over the tracks of the defendant railroad on a railroad motor car which was being operated by another employee of the Railroad, Section Foreman Connell.

As the motor car was proceeding along the track at a speed of about 15 or 20 miles an hour, the motor car ran into a switch which had been set against it and was overturned, Armburg being thrown to the ground and severely injured.

A red signal at the switch stand was so set as to indicate that the switch was set against the motor car, but Connell did not pay any attention to this signal or heed the warning shouts of members of another section crew nearby.

The Court found as a fact that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding at the time of the accident, and also found and ruled [fol. 7] that Connell in operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff. There was evidence to warrant these findings and this ruling.

There was no evidence to warrant a finding that the accident was due to any contractual assumption of risk on the part of the plaintiff and there was no evidence to warrant a finding that the plaintiff himself was not in the exercise of due care.

EDMUND S. COGSWELL, a witness called by the defendant, testified on direct examination that he was employed by be Commonwealth of Massachusetts, in the insurance department, his position being Second Deputy Commissioner of Insurance.

Q. Your duties have to do with the supervision of workmen's compensation insurance?

A. Yes, sir, the rates, the rates for workmen's compensation.

Q. The rates for workmen's compensation?

A. Yes, sir.

Q. Is that the chief part of your duties?

A. No, I also have to assist the Commissioner in matters pertaining to automobile insurance rates, to looking after the approval of policy forms and to keeping a general oversight on the activities of fraternal societies.

Q. You also approve the policy forms of workmen's compensation?

A. Yes, sir.

Q. As well as the approving of the rates?

A. Yes, sir. I might say that the Commissioner passes on most of the rate changes if he is in the department at the time, but I recommend them to him for approval.

Q. They come to him, then, through you?

A. Yes, sir.

Q. And you are the official at the State House who deals with the insurance companies and their representative bodies in fixing the compensation rates?

A. Yes, sir.

* * * * * * *

Q. Mr. Cogswell, does your department in determining the rates to be charged under workmen's compensation insurance and the like have dealings with an organization known as the Massachusetts Rating & Inspection Bureau?

A. Yes, sir.

Q. Would you just tell us what the Massachusetts Rating & Inspection Bureau is?

A. It is a bureau composed of insurance companies writ- [fol. 8] ing workmen's compensation insurance in this state. The Commissioner or his representative attends the meetings of the bureau. Ordinarily rates come to the department for approval from the bureau, the bureau filing them on behalf of the companies writing workmen's compensation insurance in this state.

Q. So the ordinary course is for the proposed rates to come to your department, to be submitted to your department by this bureau, and then your department passes upon them and approves or disapproves them, as the case may be?

A. That is the ordinary course. The companies can file direct if they wish.

Q. But in either case your department approves or disapproves the rates as submitted to you?

A. Yes, sir.

Q. As I understand it, there is a book known as the Basic Rate Manual, which is made use of by your department and adopted at least in part? Is that so?

A. Manual of Workmen's Compensation Insurance. That has the approval of the Commissioner of Insurance.

* * * * * * *

Q. May I call your attention to page 10 of these printed rules? Will you tell me whether or not that page 10 bears any record upon it?

A. Yes, sir. It is the approval of the Insurance Department, approval stamp.

Q. This is page 10 of this Manual of Workmen's Compensation Insurance that we have just referred to?

A. Yes, sir.

The first three paragraphs of the pay roll rules for workmen's compensation insurance appearing on page 10 of said Manual and approved by Merton L. Brown, Commissioner

of Insurance for the Commonwealth of Massachusetts, under the provisions of Section 52 of Chapter 152 of the General Laws to be effective January 1, 1929, and in effect at the time of the accident to the plaintiff, Armburg, were then introduced in evidence and so far as here material, were as follows:

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance. Under no circumstances shall a Compensation Insurance policy be written covering any part of a specific location of a given risk, leaving another part of the same location uninsured. If a risk or a part of a risk is at a single specific location, such risk or such part of a risk shall be carried only by a single insurance carrier.

[fol. 9] The following specific rules shall govern the treatment of payroll as the basis of premium for Compensation Insurance policies:

1. Division of Payroll

(a) The term 'risk' as used in this Manual, shall mean and include the entire operations of one employer within a given state."

Roland B. Hogan, a witness called by the defendant, testified that he was employed by the Boston and Maine Railroad in the engineering department;

Q. Is that the civil engineering department?

A. Yes; they handle the railroad's engineering problems.

Q. Now, at my request have you brought here a blueprint showing the trackage of the Boston & Maine Railroad?

A. Yes, sir. A map of the Boston & Maine Railroad, yes, sir.

Q. And that map indicates the trackage, does it, of the railroad throughout the various states?

A. Yes, sir.

Q. Now, what states are indicated on that plan as containing trackage of the Boston & Maine Railroad?

A. The states of Maine, New Hampshire, Vermont, Massachusetts, and New York.

Mr. Rockwood: I offer this in evidence.

* * * * * * *

Q. Now, at my request have you determined the amount of main line trackage that the Boston & Maine Railroad has in Massachusetts?

A. Yes, sir.

Q. And what is that trackage?

A. The Boston & Maine Railroad has 729.37 miles of road in Massachusetts.

Q. And how much has it over its entire system?

A. At the present date?

Q. No, as of July 8, 1929, that is.

A. It had 2077.02 miles of road.

* * * * * * *

Q. That included not only the track located in Massachusetts but the track located in the other states?

A. In the other states.

Q. And the figure that you gave for trackage in Massachusetts, was that also as of July 8, 1929?

A. Yes, sir.

Q. That is, Mr. Hogan, there were about 1300 miles of track outside of Massachusetts on the Boston & Maine system and about 700 inside; is that so?

A. Well, the difference between those figures I gave you would give that.

* * * * * * *

[fol. 10] Cross-examination:

Q. Now, let us see. The Boston & Maine Railroad, the Massachusetts corporation, is the lessee of some railroad lines in this state which you have included in your totals, isn't it?

A. I think so.

Q. You don't know?

A. I could not say positively.

Q. So that you don't know whether these lines here, the road that you have spoken about,—you don't know whether

it is leased or owned by the railroad or whether it has any title to it at all or not, do you?

A. Well, the map that you have there is just——

Q. Do you know?

A. I could not say positively.

Q. Well, now, can you tell about the railroad which is known as the Fitchburg Railroad? That is a road running from Boston to Fitchburg, isn't it?

A. Yes, sir.

Q. That is a road operated and maintained by this defendant corporation, isn't it?

A. Yes, sir.

Q. And that is the road which runs through South Acton, West Acton and Boxborough?

A. Yes, sir.

Q. And that appears on this map as a road running from Boston to Fitchburg, doesn't it?

A. Yes, sir.

Q. Now, do you know whether or not that railroad is leased by the Boston & Maine, the Massachusetts corporation, and operated by it?

A. I can only say what I think.

Q. No, no, not what you think; do you know?

A. My understanding is that it is owned by the Boston & Maine.

Q. Do you know?

A. I don't believe I am qualified to answer questions like that.

Q. It is a railroad that begins at Boston and runs to Fitchburg?

A. Yes, sir.

Q. And that is the railroad on which this man was injured, beginning at Boston and running to Fitchburg?

Mr. Garland: If the witness knows. The Fitchburg Division?

Mr. Rowley: If the witness knows. It may be called a division.

Q. Supposing you do call it a division, it is what was formerly the Fitchburg Railroad, isn't it?

A. Yes, sir.

Q. And it has been taken over either by lease or purchase by the Boston & Maine Railroad, and is now operated by it?

A. Yes, sir.

[fol. 11] Q. And it begins at Boston and runs to Fitchburg?

A. Yes, sir.

Mr. Rowley: That is all——

Q. And that is all in the State of Massachusetts?

A. Yes, sir.

Redirect examination:

Q. The railroad that Mr. Rowley is referring to he says runs from Boston to Fitchburg? Does it run beyond Fitchburg?

A. Yes, sir, that is only one of the way stations.

* * * * * * *

Q. The railroad that runs from Boston to Fitchburg, whether you call it the Boston & Fitchburg or the Boston & Maine, continues beyond Fitchburg and runs out of the state, does it not?

A. Yes, sir; Fitchburg is not the end of the line.

Q. That is only a way station?

A. Yes, sir.

* * * * * * *

Recross-examination:

Q. It runs over a road which was formerly a part of the old Boston & Maine Railroad beyond there, doesn't it?

A. I didn't quite get your question.

Q. It runs over tracks which were formerly a part of the old Boston & Maine Railroad beyond Fitchburg, doesn't it?

A. Well——

Q. If you know? Have you ever been out there?

A. A very few times, yes, sir.

Q. Your work is making blueprints, and that kind of work in the office?

A. I am a draughtsman, yes, sir.

Q. You are a draughtsman brought up here to testify in regard to the trackage and so on? Where did you get your figures,—out of something that was told you or given you by somebody else? You never made them up, did you, yourself?

A. No, sir.

Q. And your work is that of a draughtsman? How long have you been a draughtsman there?

A. Been a draughtsman since 1916.

Q. And, so far as you know, this road runs from Boston to Fitchburg? That is known as a separate part, a separate division, isn't it?

A. Not from Boston to Fitchburg, no, sir.

Q. Well, isn't it?

A. The Fitchburg Division?

Mr. Garland: It never ended there.

[fol. 12] Q. Yes; that was owned by the Fitchburg Railroad, a separate corporation from this, wasn't it?

A. From Boston to Fitchburg was a separate corporation.

* * * * * * *

Q. Do you know whether the old Fitchburg Railroad was taken over by the Boston & Maine Railroad? Do you know?

A. I understand it was.

Q. Well, do you know?

A. I could not give you any date as to when it was or anything like that, but that is my understanding, that it was taken over by the Boston & Maine.

Q. You have no knowledge on it one way or the other, have you?

A. I could not tell you the detail.

* * * * * * *

Q. You have nothing to do with the titles of the trackage or the roads, have you?

A. No, my work has been draughting.

Mr. Rowley: That is all.

Mr. Rockwood: Now, I offer this map. May that be marked?

Mr. Rowley: That is an exhibit. I supposed you put it in.

The Court: It may be marked.

(The blueprint map of the Boston & Maine System is marked as Exhibit 8.)

IVAN B. DEARBORN, a witness called by the defendant, testified that he had been employed by the Boston and Maine Railroad in its Payroll Accounting Department for 18 years.

Q. Now, as a part of your duties in that department, have you had supervision over making monthly reports required by the Federal Interstate Commerce Commission?

A. Yes, sir.

Q. Now, are these copies of such reports (showing papers to the witness)?

A. Yes, sir.

Q. For the month of July, 1929?

A. For the month of July, 1929, similar to the one sent to Washington.

Q. That is a copy of the report sent to the Interstate Commerce Commission?

A. I do know it positively of my own personal knowledge,—at least, I know it was put in the mail.

The Witness: Perhaps a slight explanation of how this report is prepared would help at this time.

Q. Yes. Will you explain that?

A. A majority of those reports,—in fact, all of them, are taken direct from the payrolls from which the men are paid. [fol. 13] There are some seventy odd detailed reports; some of them are prepared at outside points, division headquarters, but over fifty of them are prepared right in the room where I work every day by different clerks in that room. They are all combined and compiled into one big statement, of which this is a true copy, being run off on a hectograph machine at the same time that the original was taken off going to Washington. There is no one figure on here giving the total compensation and the total number of men, but there are three figures which can be added together to give the total compensation and three other figures which can be added together to give the total number of men.

The Court: You mean the total payroll?

The Witness: The total payroll, the monthly payroll and compensation.

* * * * * * *

Q. This record here is kept in the usual course of business down at the Boston & Maine, is it not?

A. Yes, sir.

Q. And is compiled, as you say, from the payroll accounts of the various men?

A. Yes, sir.

Mr. Rowley: Not by this witness?

The Witness: Not in detail, no, sir, but entirely under my supervision.

. . . . . .

The Court: If I understand you, that is a duplicate original of a paper that the railroad sends through to the Interstate Commerce Commission?

The Witness: Yes, sir.

The Court: Showing the personnel of the road and the compensation paid?

The Witness: Yes, sir, divided into certain classes, as outlined by the Commission.

. . . . . .

Q. Now, won't you tell us the total number of employees and the total payroll for the month of July, 1929?

A. I have three figures here——

The Court: Tell us where you got them from.

The Witness: The first three sheets of this report cover all employees of the railroad except in the four branches of the train service, that is, engineers, firemen, conductors, and brakemen, and they are summarized at the bottom of the third sheet under this heading which says, "Total all groups (except train and engine)", the men paid on an hourly basis, and those paid on a daily basis, which would be, on a daily basis, 2208, and on an——

[fol. 14] Q. 2208 men?

The Court: How many?

The Witness: 2208 men on a daily basis; on an hourly basis, 15,778 men. Then the fourth sheet of this report covers all men in the four branches of train service,—train and engine service, the conductors, firemen, brakemen and the engineers, and they are all paid on an hourly basis, and the total number is 3,971. Those three figures added together give you the total number of employees for the month of July, 1929. They are all shown in the column

headed "2" on those sheets. The compensation is obtained in the same way, by taking the figures shown in column 3 of those same sheets. The compensation of the men paid on a daily basis is $411,001. The cents are dropped, either dropped or added as the case may be.

The Court: $411,000?

The Witness: $411,001. Now, for the men on an hourly basis the compensation is $1,921,971. In the train and engine service the compensation is $811,062, those three being added together give the total compensation for the month of July, 1929.

Q. That is, the total payroll?

A. The total payroll.

Mr. Rockwood: May this be marked your Honor, it being understood that this instruction contained on the back of the last page is not in?

The Court: Yes.

(The monthly report of employees, service and compensation, of the Boston & Maine Railroad, is marked as Exhibit 9.)

Cross-examination:

Q. Did you report the revenue also?

A. No, sir, not on that report.

. . . . . .

Q. So that you simply report——

A. The actual payroll.

Q. What you report is the number of employees in the middle of the month, isn't it?

A. Yes, on the 15th day.

Q. On the 15th day? So that this does not cover July 8th?

A. So far as that actual number of employees is concerned, it would not, no.

Q. It covers the middle of the month? And you report in here the time paid for? Where do you classify yourself?

A. Myself?

Q. Under what class do you classify yourself?

A. Myself in Class 10.

[fol. 15] Q. Class 10, Clerks, B?

A. Yes, sir.

Q. That is the one where the time paid for but not worked is 31,495?

A. Yes, sir, holidays and Saturday afternoons.

Q. Are you included in that?

A. My time for those periods, yes, sir. By the way, that figure you read was hours and not money.

Q. And what was the pay per hour?

A. It varies.

Q. For clerks? About?

A. I could not say the average pay. I have no personal recollection of that now.

Q. Now, I understand you did not make this up yourself, did you?

A. Not personally, no, sir.

Q. What is your position in the road?

A. I have charge of one branch of the payroll accounting.

Q. And what work do you do?

A. Supervision of the preparation of payrolls for the engineering and maintenance of way and car repair departments and supervision of that report there.

Q. Your exact work is making out the pay envelopes or the pay-checks? You pay by checks, don't you?

A. I have nothing to do with the preparation of pay-checks. Mine is entirely payrolls.

Q. Making up a list of the persons who are to get their checks?

A. Yes, sir.

Q. You make up their time?

A. The time is sent in from the outside, and we figure it.

Q. You do the figuring of that, do you?

A. Yes, sir.

* * * * * * * *

Q. Figuring payrolls, making up lists of the names and addresses of persons?

A. Yes, sir, that is one part of the work.

Q. You have no personal knowledge of the number of employees in the middle of the month, have you?

A. Except as they come in on these reports from which the payroll is prepared.

Q. And where they came from, or what they were you don't know? Who prepared them you don't know?

A. I have no personal knowledge of the men, but I know the names as they come in.

Q. There is nothing here to show who these employees are?.

A. Not by name, no, sir.

* * * * * * *

[fol. 16] Q. Anybody else direct the preparation of these except you?

A. Mr. Phillips and Mr. Mather are both in charge—are over me. Mr. Phillips is in charge of all payroll matters. I simply have one portion of them under me.

Q. I suppose after you made this out carefully and thoroughly you made oath to the truth of it, didn't you?

A. I don't sign it, no sir.

Q. You don't sign it?

A. No, sir, Mr. Mather has that.

Q. This is not a complete copy of the paper that was sent down there, is it? I notice this one looks as if it had been prepared to have A. T. Mather make oath that the annexed return was prepared under his direction.

A. It is.

Q. And it purports, although it is not signed, to have been subscribed and sworn to on September 7th, 1929. It was not prepared under your direction, but under Mr. Mather's, wasn't it?

A. Yes, I suppose you would say that, although the detail was——

Q. When were you first called up here to bring this up?

A. Yesterday morning.

* * * * * * *

Q. Who made that up in the first place? Who made it up, do you know?

A. Why, yes.

* * * * * * *

Q. You didn't make it up?

A. I didn't make up the detailed work, no. I said so in the first place.

PATRICK J. MULLANEY, a witness called by the defendant, testified that he was employed by the Boston and Maine Railroad as Assistant Freight Traffic Manager.

Q. Is there any freight traffic manager?

A. No, sir.

Q. Now, at my request did you obtain some records of the railroad showing the amount of freight carried on the railroad during the year 1929?

A. I did.

Q. And have you those records with you?

A. Yes, sir.

* * * * * * *

Q. Is this a record that is also required by the Interstate Commerce Commission?

A. It is. It is an annual report of freight commodity statistics to the Interstate Commerce Commission.

Q. Now, can you tell us the total tonnage of freight carried by the Boston & Maine Railroad from that report in [fol. 17] both intrastate and interstate commerce, inclusive?

A. During the year 1929 the railroad handled 23,922,566 tons, net tons of 2000 lbs.

* * * * * * *

Q. Now, have you any item there which shows how much freight was carried by the railroad in tons between points in the same state during that year?

A. No.

* * * * * * *

Q. Now, do you know how this paper here is compiled?

A. It is compiled in our accounting department.

Q. From the railroad's freight records?

A. Yes, sir.

Q. And it is compiled under four columns or classifications of freight; is that correct?

A. That is correct.

Q. And what are those four columns?

A. This has to do with revenue freight originating on the Boston & Maine Railroad and terminating on the Boston & Maine Railroad. That is one column. Freight originating on the Boston & Maine Railroad and delivered to other

railroads. That is another column. Freight received from other railroads and terminating on the Boston & Maine Railroad. That is the third column. Freight received from other carriers and delivered to other carriers. That is another column.

Q. That is, that fourth column means where the Boston & Maine Railroad comes in between two other carriers?

A. Yes, that is right.

Q. Carrying the freight along?

A. That is right.

* * * * * * *

The Court: As far as the records that are kept, I understand that that is a compilation from the records—from the freight records?

Mr. Rockwood: That is so, your Honor.

The Court: They are accurate?

Mr. Rockwood: Yes, sir.

The Court: If they are not accurate, we don't want them. That is the proposition.

Mr. Rockwood: Of course there is no reason for the Railroad's not turning out accurate records on these points.

The Court: Are these papers that are kept in the usual course of the Boston & Maine's business?

Mr. Garland: Yes, sir.

The Court: Compiled from their freight books?

Mr. Garland: Yes, sir.

[fol. 18] Q. That is so, isn't it?

A. They are, yes, sir.

The Court: At that time? Not something made now for the purposes of this case?

The Witness: Indeed not.

Mr. Rockwood: None of these records, your Honor, were made for this case. They were in existence before this case started.

Q. Can you give us the figure of the total amount of tonnage of the freight originating on and terminating on the Boston & Maine Railroad?

A. Approximately 15% of the total.

Q. Approximately 15% of the total tonnage?

A. Yes, sir.

* * * * * * *

Q. As I understand it, that 15% of the total tonnage covers all the freight carried on the railroad, the Boston & Maine Railroad, originating on and terminating on that railroad?

A. That is right.

Q. That is, only 15% of the business of the Boston & Maine Railroad's freight business does not involve the use of some other railroad in carrying the freight to and from its destination?

A. That is right.

The Court: Between points within the state, if I understand you correctly? In other words, this is intrastate?

Mr. Garland: That includes a little interstate also.

The Court: No, I didn't understand so. Let us make sure.

Mr. Rockwood: My question was not supposed to be founded on that, your Honor. Suppose there was a shipment starting from Boston on the Boston & Maine Railroad, and it was going to Concord, New Hampshire, still on the Boston & Maine Railroad. That would start on and terminate on the Boston & Maine Railroad, and it would come under this classification.

The Court: Then I misunderstood.

Mr. Garland: In other words, that includes also some interstate freight.

Mr. Rockwood: This includes some intrastate as well as interstate.

The Court: I understand now.

Q. Would there be any intrastate shipments covered by any of the other classifications?

A. It is possible, but they would be a very small percentage of the total.

Q. Could you explain that to us?

A. I can very easily explain it. A shipment from Salem, Mass., on the Boston & Maine, to Ashland, Mass., on the [fol. 19] Boston & Albany Railroad would be intrastate, but still would not be in the first column.

Q. That would come under what?

A. Originating on the Boston & Maine and delivered to another carrier.

Q. Now, do you know of your own knowledge how much that traffic might be?

Mr. Rowley: That I object to.

The Court: That means from observation, not from hearsay.

Mr. Rockwood: Yes, your Honor. That is what I am saying, of his own knowledge.

The Court: You may have that.

Q. I asked you whether you know of your own knowledge what proportion of the tonnage carried, the tonnage carried intrastate, over the Boston & Maine Railroad to any other connection carrier would amount to?

A. No, I don't. I could not answer that except the answer that I know it is a very small proportion.

Mr. Rowley: I ask that be stricken out.

The Court: He may answer that question Yes or No. I don't think that calls for an answer of how much. The question is whether you know from your own knowledge, first.

The Witness: Yes, sir.

The Court: It means, from his own personal observation.

Q. Now, of your own knowledge what would that proportion be?

A. Very, very small.

Q. Can you approximate it at all?

A. A very liberal approximation in my opinion would be 10% or under.

Q. 10% or under?

A. Yes, sir.

Q. Now, are you able to give us any idea as to freight which might be carried, say, from Ashland on the Boston & Albany to Salem on the Boston & Maine Railroad? What proportion would that be?

A. I included traffic in both directions in that other estimate.

Q. You included traffic in both directions? That is what I wanted to be sure of. And your other figures of 15% of the total tonnage as tonnage originating on and terminating on the Boston & Maine Railroad alone included, as you have already stated, not only intrastate shipments within Massachusetts but interstate shipments on the Boston & Maine Railroad from Massachusetts to other states on the Boston & Maine Railroad?

A. That is correct.

[fol. 20] Q. And also intrastate shipments within those other states on the Boston & Maine Railroad?

A. That is also correct.

* * * * * * *

Cross-examination:

Q. You did not keep these figures, did you?

A. No, sir.

* * * * * * *

Q. And you haven't any figures here to show the number of tons of freight of any kind which were shipped from one point in Massachusetts to any other point in Massachusetts, have you?

A. No, sir.

Q. Neither have you figures to show how much freight was shipped from one point in Massachusetts to a point in New Hampshire, or Maine, or New York, have you?

A. On the Boston & Maine Railroad?

Q. Yes.

A. They are shown in that statement.

Q. It does show here the number of tons shipped from—we will say from Lowell to Nashua?

A. No, that is not shown specifically.

Q. Not shown specifically? But freight which is shipped from Lowell to Nashua is included with the freight shipped from Lowell to Salem?

A. That is correct.

Q. So that there is nothing to show the freight which is shipped from Massachusetts to a point in another state except figures which include shipments from points in Massachusetts to other points in Massachusetts?

A. That is correct.

Q. Now, I think you gave us the figures as to the tonnage, twenty-three million tons of freight handled. You neglected to state the amount which the railroad received from the handling of that twenty-three million tons of freight? * * * Within the period that you stated here, how much did you get?

A. $52,749,586.

* * * * * * *

(The annual report of freight commodity statistics of the Boston & Maine Railroad to the Interstate Commerce Commission, consisting of five sheets, is marked as Exhibit 10.)

The blueprint map of the Boston and Maine system introduced in evidence as Exhibit 8, the monthly report of employees, service and compensation of the Boston and Maine Railroad on four sheets covering the month of July, 1929, and introduced in evidence as Exhibit 9, and the annual report for the year 1929 of freight commodity statistics of the Boston and Maine Railroad for the Interstate Com- [fol. 21] merce Commission consisting of five sheets and introduced in evidence as Exhibit 10, are each and all of them made a part of this report and may be referred to at the argument of this case but need not be copied or printed.

DEFENDANT'S REQUESTS FOR RULINGS

At the close of the trial and before the final arguments, the defendant duly made the following written requests for rulings:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. Upon all the evidence and the pleadings the plaintiff is not entitled to recover.

3. There is no evidence to warrant the Court in finding that the defendant as distinguished from its servants and agents was negligent.

4. There is no evidence to warrant the Court in finding that any negligence on the part of the defendant as distinguished from its servants and agents was the proximate cause of the injury to the plaintiff.

5. There is no evidence to warrant the Court in finding that any employee or servant of the defendant was negligent.

6. There is no evidence to warrant the Court in finding that the negligence, if any, of any employee or servant of the defendant was a proximate cause of the accident.

7. The Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

8. St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

9. The defences of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow servant are open to the defendant in this action.

10. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

12. As a matter of law Connell was a fellow servant of the plaintiff.

[fol. 22] 13. As a matter of law upon all the evidence the employee who was operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff Armburg.

14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(a) Because upon all the evidence the injury to the plaintiff was caused by the negligence of a fellow servant and the defence that the said injury was so caused is open to the defendant in this action as a matter of law and constitutes a complete defence thereto.

(b) Because as a matter of law upon all the evidence the plaintiff's injury was caused by the negligence of a fellow servant.

(c) Because as a matter of law the defence that the injury was caused by the negligence of a fellow servant is open to the defendant in this action.

(d) Because as a matter of law the Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

(e) Because as a matter of law St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(f) Because as a matter of law the defendant, which is a railroad corporation engaged in both intra and interstate commerce, falls altogether outside the operation of the Workmen's Compensation Act, St. 1911, chap. 751, now G. L. c. 152.

(g) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

MEMORANDUM ON REQUESTS FOR RULINGS

The Court filed a memorandum disposing of the defendant's said requests for rulings as follows:

1. Refused.

2. Refused.

[fol. 23] 3. Granted.—I find that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the Railroad motor car upon which the plaintiff was riding.

4. Granted.

5. to 11 (inclusive). Refused.

12. Granted.—I find that to be the fact, even if it were not so as a matter of law.

13. I find as a fact that "Connell" was the employee who was operating the Railroad motor car at the time of the accident, and that he then in so doing was a fellow servant of the plaintiff.

14. Refused.

As set forth in said memorandum, the Court found that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding, and both found as a fact and ruled as a matter of law that Connell in operating the railroad motor car at the time of the accident was so doing as a fellow servant of the plaintiff.

The Court found for the plaintiff and assessed the plaintiff's damages in the sum of $26,500.

This report contains all the evidence material to the questions reported.

The defendant claiming to be aggrieved by the refusals to rule as requested, namely, by the refusal of the Court to give the defendant's said requests for rulings numbered 1, 2, 5, 6, 7, 8, 9, 10, 11, 14 and each of them, I hereby report the same to the Appellate Division for determination.

Joseph T. Zottoli, Justice of the Municipal Court of the City of Boston.

Filed and allowed May 3, 1930.

In Municipal Court of City of Boston

Plaintiff's Declaration—Filed Mar. 1, 1930

And the plaintiff says that on or about July 8, 1929, at that part of Acton in the County of Middlesex called South Acton, he was lawfully travelling in and upon a motor car which was operated and propelled over the tracks of the Boston and Maine Railroad by the defendant, its agents and servants; that the plaintiff was in the exercise of due care; that by reason of the carelessness and negligence [fol. 24] of the defendant, its agents and servants, the motor car upon which the plaintiff was riding was derailed

and the plaintiff was thrown from said motor car and under said motor car, his neck was broken, his head was cut, his shoulder dislocated, his collar-bone broken, and he was otherwise seriously and permanently injured; that by reason of the carelessness and negligence of the defendant, its agents and servants, the plaintiff has been made to suffer great pain and anguish of body and mind, he has been put to great trouble and expense, his ability to work and support himself and family has been permanently impaired, and he has otherwise been seriously and permanently injured, all to his great damage.

Clarence W. Rowley, Plaintiff's Attorney.

IN MUNICIPAL COURT OF CITY OF BOSTON

DEFENDANT'S ANSWER—Filed Mar. 4, 1930

Now comes the defendant in the above entitled action and for answer denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that if the plaintiff was injured as alleged in his declaration, which the defendant denies, said injuries were due in whole or in part to contributory negligence on the part of the plaintiff.

And further answering the defendant says that if the plaintiff was injured as alleged in his declaration, which the defendant denies, said injuries were due solely to the negligence of a fellow servant.

And further answering the defendant says that the plaintiff assumed the risk of the alleged accident.

By Its Attorneys, Hurlburt, Jones & Hall.

IN MUNICIPAL COURT OF CITY OF BOSTON

FINAL ORDER OF APPELLATE DIVISION

Ordered that the Clerk make the following entry under said case in the docket, viz:

Report dismissed.

By the Court.

William F. Donovan, Clerk.

June 27, 1930.

[fol. 25] IN MUNICIPAL COURT OF CITY OF BOSTON

DEFENDANT'S CLAIM OF APPEAL FROM FINAL DECISION OF THE APPELLATE DIVISION—Filed July 1, 1930

Now comes the defendant in the above entitled action and hereby appeals to the Supreme Judicial Court for the Commonwealth from the final decision of the Appellate Division entered on June 27, 1930 dismissing the report in said action.

By Its Attorneys, Hurlburt, Jones & Hall.

Copy. Attest:

Volney D. Caldwell, Ass't. Clerk.

[fol. 26] IN MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS, APPELLATE DIVISION

Bolster, C. J.; Dowd, J.; Adlow, J.

ARMBURG

v.

BOSTON & MAINE R. R.

(May 26-June 27, 1930)

OPINION—Filed June 27, 1930

Two questions only arise on this report, whether as a matter of statutory interpretation, the provisions of the Massachusetts Workmen's Compensation Act, G. L. Ch. 152, apply at all to a railroad corporation operating in both interstate and intrastate commerce, and whether, if that question be answered in the affirmative, the provision of section 66, shutting off in an action at law the defense that the injury was caused by the negligence of a fellow employee does not fall, in its application to such a corporation, because putting an undue burden on interstate commerce.

The act, in our opinion, leaves no room for doubt as to

the first question. Section one provides that "unless a different meaning is plainly required by the context"—(not by results)—"or specifically prescribed"—"employee" shall mean "every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer." The generality of the definition—"every person," coupled with the statement of a cognate exception, renders any judicial addition thereto, for utter exclusion, well-nigh impossible. [fol. 27] The practice frequently indulged so to read a statute that it shall not contravene constitutional requirements does not warrant the rejection or warping of plain language. And so far as the course of judicial decision is of moment, it indicates that this defendant is within the act.

Ashton v. B. & M. R. R., 222 Mass. 66.
Henshaw v. B. & M. R. R., 222 Mass. 459.
Lyford v. B. & M. R. R., 227 Mass. 10.

At the same time, it is plain that the language of the act is not to be so extensively applied as to give results that never could have been intended.

cf. Gould's case, 215 Mass. 480.
Zoulalian v. N. E. San. & Ben. Ass'n, 230 Mass. 102.

But what the scope of such inclusion may be is quite a different question. We are not, on this record, called upon to decide what the results might be, either as to employer or employee, in a case not wholly within the field of local control.

cf. Com. v. Potter, 254 Mass. 272, and cases cited.
Toland's Case, 258 Mass. 470.
Lynch v. B. & M. R. R., 227 Mass. 123.

This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the conditions legislatively fixed. Its motives which led to that choice, based on an alleged difficulty in con-

forming its methods of doing business to the mechanism of the compensatory system, are immaterial. We have no doubt that there are other employers in our complex industrial life who have found the choice equally hard. Such matters are of legislative, not judicial, cognizance.

Neither do we see any ground for saying that the act puts an undue burden on interstate commerce. The necessary inclusion for insurance of all employees is assumed. That point is expressly left open at the court's own instance, in the main case touching the matter.

Cox's Case, 225 Mass. 220, 223.

We feel sure that the ultimate decision must be that the legislature never intended a clear present to insurers by quiring insurance upon those whose duties and risks were such that there could be no collection and the "Pay-Roll [fol. 28] Rules" appear to make such allowance.

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured *which is the subject of insurance.*" (Italics ours.) It is a purely gratuituous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks. The courts have not abdicated in favor of the Massachusetts Rating and Inspection Bureau.

All beyond this is the fact that the legislature has changed the common-law defence of negligence of a fellow-servant. It hardly needs argument that not even an interstate carrier has a vested right in such a rule, in its application to intrastate matters.

Young v. Duncan, 218 Mass. 346.
N. Y. Cent. R. R. v. White, 243 U. S. 188.
Hawkins v. Bleakly, 243 U. S. 210.

Report dismissed.

A true copy. Attest:

Volney D. Caldwell, Asst. Clerk.

[File endorsement omitted.]

[fol. 29] In Supreme Judicial Court of Massachusetts, at Boston, Sept. 10, 1931

Rescript—Filed in Municipal Court Sept. 15, 1931

In the Case of

Fred Armburg

vs.

Boston and Maine Railroad,

pending in the Municipal Court of the City of Boston for the County of Suffolk,

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Order dismissing report affirmed.

By the Court.

Walter F. Frederick, Clerk.

September 10, 1931.

A true copy. Attest:

Volney D. Caldwell, Asst. Clerk.

[fols. 30 & 31] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the reporter of decisions, to which reference is made.

[fol. 32] [File endorsement omitted.]

[fol. 33] In Supreme Judicial Court of Massachusetts

Opinion

Rugg, C. J.:

The plaintiff seeks by this action to recover compensation for personal injuries sustained by him by reason of the derailment of a railroad motor car, on which he was riding in the course of his employment by the defendant, as a

result of the negligence of a fellow employee. These facts, as of the time of the injury to the plaintiff, were agreed at the trial: the defendant was a common carrier for hire of freight and passengers operating tracks in Maine, New Hampshire, Vermont and New York, as well as in Massachusetts, and was conducting both interstate and intrastate commerce of considerable magnitude, and was not a subscriber under the workmen's compensation act of this Commonwealth, G. L. c. 152; the plaintiff was engaged in intrastate and not in interstate commerce; there was no evidence to support a finding that the injury to the plaintiff was due to any contractual assumption of risk on his part, or that he was not in the exercise of due care. The ruling of the trial judge that there was no evidence of negligence of the defendant as distinguished from negligence of its servants or agents is not now challenged. The trial judge also found that the injury to the plaintiff was caused by the negligence of a fellow servant, and made a finding for the plaintiff.

The defendant contends that the workmen's compensation act (hereafter called the act) is not applicable to a railroad engaged in both intrastate and interstate commerce, and that hence the defence that the injury to the plaintiff was caused by a fellow servant is open to it notwithstanding the provision of G. L. c. 152, § § 66, 67, to the effect that such defence, with exceptions not here material, is denied [fol. 34] to an uninsured employer. Bernabeo v. Kaulback, 226 Mass. 128. McGonigle v. O'Neill, 240 Mass. 262, 263. It was assumed that the act was so applicable for the purposes of the decision in Ashton v. Boston & Maine Railroad, 222 Mass. 65, 69, Henshaw v. Boston & Maine Railroad, id. 459, 461, and Lyford v. Boston & Maine Railroad, 227 Mass. 10, and the contrary assumption was made in Hix v. New York Central & Hudson River Railroad, 230 Mass. 309, 312. The question was expressly left open in Cox's Case, 225 Mass. 20, 223, has never been and must now be decided.

At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in Seaboard Air Line v. Horton, 233 U. S. 492, at 501: "It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employes in interstate trans-

portation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases, 223 U. S. 1, 55." That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased.

The relevant provisions of the workmen's compensation act are these sections of G. L. c. 152:

1. "The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings: * * * (4) 'Employee,' every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, [fol. 35] business, profession or occupation of his employer. * * *"

§ 66. "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence 1, that the employee was negligent; 2, that the injury was caused by the negligence of a fellow employee; 3, that the employee had assumed the risk of the injury."

§ 67. "The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person."

It is provided by § 68 that the employers' liability act, both in respect to personal injuries, G. L. c. 153, and death, G. L. c. 229, §§ 4, 7, 8, 9, 10, shall not apply to the employees of an insured person. The act as originally enacted in St. 1911, c. 751, Part V, § 2, the Part corresponding to said § 1 (4), contained, as one of the limitations on the wide sweep of "employee" as defined, the words, "and except one whose employment is but casual." Gaynor's Case, 217 Mass. 86. Those words were stricken from the section by St. 1914, c. 708, § 13. That original section did not contain among the limitations upon the definition of "em-

ployee" the words, "except masters of and seamen on vessels engaged in interstate or foreign commerce"; they were added by St. 1913, c. 568, § 1.

The words of § 1 (4) just quoted are of broad import. It is difficult to confine by construction a definition of employee which states explicitly that it includes "every person in the service of another under any contract of hire," with two specified exceptions. The main purpose of the act reenforces the comprehensiveness of this definition. That purpose was to substitute a method of accident insurance, in place of the rights and liabilities established [fol. 36] by the common law as modified by the employers' liability act and other statutes, for substantially all employees save the excepted classes, to the extent that the attainment of that result was within the jurisdiction of the General Court. It was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. Although the act was optional and not compulsory, its general tenor disclosed a legislative aim to secure its wide adoption and use. The interpretation of the act has been and ought to be, so far as reasonably practicable, to promote the accomplishment of its beneficent design. Express exclusion of two classes of employees from the operation of the act and the enactment of two amendments to the excluding clause are strong indications that all others within the natural purport of its language were to be included. If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department. "The statute is as broad as the jurisdiction of the Commonwealth." Kinney v. Treasurer & Receiver General, 207 Mass. 368, 369. Young v. Duncan, 218 Mass. 346, 349. Gillard's Case, 244 Mass. 47, 51, 52. Toland's Case, 258 Mass. 470, 472. The decision in Zoulalian v. New England Sanitorium & Benevolent Association, 230 Mass. 102, rests upon the general principle of exoneration of charitable trusts from liability

[fol. 37] for negligence of their servants and agents. There was no ground for substitution of workmen's compensation liability because there was at common law no liability. Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66.

The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce. Corbett v. Boston & Maine Railroad, 219 Mass. 351, 356. Barrows v. Farnum's Stage Lines, Inc., 254 Mass. 240, 245-246, and cases there reviewed. Commonwealth v. Potter, id., 271, 273. It was said in Wabash Railroad v. Hayes, 234 U. S. 86, 89-90:

"Had the injury occurred in interstate commerce * * * the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. [Cases cited.] On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling. Illinois Central Railroad v. Behrens, 233 U. S. 473." Taylor v. Taylor, 232 U. S. 363, 368. Michigan Central Railroad v. Vreeland, 227 U. S. 59, 66-67. Toledo, St. Louis & Western Railroad v. Slavin, 236 U. S. 454. Raymond v. Chicago, Milwaukee & St. Paul Railway, 243 U. S. 43, 45.

There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. New York Central Railroad Co. v. Winfield, 244 U. S. 147. New York Central Railroad v. [fol. 38] Porter, 249 U. S. 168. Southern Pacific Co. v. Industrial Accident Commission, 251 U. S. 259. See, also, American Railroad Co. v. Birch, 224 U. S. 547. It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business. It was said by Chief Justice Marshall in Gibbons v. Ogden,

9 Wheat. 1, at 195: "The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Both the words and the purpose of the act seem to require the conclusion that, with respect to the injury to the plaintiff occurring while he was engaged in intrastate commerce, the defendant is deprived of the defence that the injury was caused by a fellow servant of the plaintiff.

There is nothing contrary to this conclusion in Cox's Case, 225 Mass. 220. It there was held that an employer must insure the whole of his business conducted within the Commonwealth as a single commercial or manufacturing entity, in order to secure the benefits of the act, and could not accept the act as to one part of that business and reject it as to another part. Transportation companies conducting both intrastate and interstate commerce were expressly excepted, at page 223, from the scope of that decision. Whatever was there said was directed to the issue then before the court. The act does not require, and the decision in the Cox case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act [fol. 39] with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court. It is an implied condition of all statutes that they are intended to be operative only within the jurisdiction of the legislative body enacting them. This statement is subject to the limitation that, where an insured employer makes a contract in Massachusetts with one to become his employee and to do work outside the Commonwealth, there may be recovery under the

act by the employee, if injured, according to the terms of St. 1927, c. 309, §§ 2, 3. Pederzoli's Case, 269 Mass. 550. McLaughlin's Case, Mass. Adv. Sh. (1931) 243. See Keaney's Case, 217 Mass. 5; compare Gould's Case, 215 Mass. 480.

It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infre- [fol. 40] quently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose.

The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portion of its employees engaged in intrastate commerce. That, however, is a legislative and not a judicial question. We can only interpret the statute as it was framed. Arruda v. Director General of Railroads, 251 Mass. 255, 262-263.

The same considerations apply to rules and regulations for the prevention of accidents required by G. L. c. 152, § 64. Such rules and regulations could not interfere with interstate commerce. So far as relevant exclusively to intrastate commerce, they do not go outside the legislative domain of this Commonwealth.

Reliance is placed by the defendant on the contention that, if under the act it should insure its employees so far as engaged in intrastate business, it would not be relieved of the liability for the death of such an employee imposed by G. L. c. 229, § 3, and that, therefore, the Legislature could not [fol. 41] have intended the act to apply to a carrier like the defendant. The liability imposed by said § 3 is in the nature of a penalty for causing the death of an employee in the circumstances there set forth. It was first enacted in substance by St. 1883, c. 243. It has since remained in our statutes. It was unaffected by the enactment of the employers' liability act, St. 1887, c. 270, §§ 2, 3. The history of these statutory developments touching recovery of damages for causing death is set forth in detail in Brooks v. Fitchburg & Leominster Street Railway, 200 Mass. 8. If it be assumed that the operative force of said § 3 would not be affected as to the defendants by its becoming insured under the workmen's compensation act, that does not justify the inference that the Legislature did not intend to include railroad corporations conducting both intrastate and interstate commerce within the sweep of the act. The liability established by said § 3 is punitive in nature; the penalty is to be assessed solely with reference to the degree of culpability of the defendant, or its agents or servants, and it coexists now as always hitherto with the liability for death established by the employer's liability act. G. L. c. 229, §§ 4, 7, 8, 9, 10. G. L. c. 153. The measure of damages and the basis of liability are different under said § 3 and under said § 9.

The intention of the General Court in enacting any statute must be ascertained, not alone from the literal meaning of its words, but from a view of the whole system of which it is but a part, and in the light of the common law and previous statutes on the same subject. Robinson's Case, 131 Mass. 376, 377. Duggan v. Bay State Street Railway, 230 Mass. 370, 374. Commonwealth v. Welosky, Mass. Adv. Sh. 1671. Giving full weight to that principle, we think [fol. 42] that the act is applicable to the defendant as to its employees while engaged in intrastate commerce.

The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. 1, § 8, of the Constitution of the United States. No statute of the Commonwealth can impose a burden upon in-

terstate commerce. That is fundamental under our dual system of government. New England Telephone & Telegraph Co. v. Department of Public Utilities, 262 Mass. 137, 149, and cases cited. Sprout v. South Bend, 277 U. S. 163. The Minnesota Rate Cases, 230 U. S. 352, 398-412. New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346. In Sherlock v. Alling, 93 U. S. 99, at 103, it was said:

"In conferring upon Congress the regulation of commerce, it was never intended to cut off the States from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." Pennsylvania Railroad v. Hughes, 191 U. S. 477, 488. Missouri Pacific Railway v. Castle, 224 U. S. 541, 544-545. Chicago, Milwaukee & St. Paul Railway v. Solan, 169 U. S. 133, 137-138.

The workmen's compensation act is an exercise of the police power of the Commonwealth. Mountain Timber Co. v. Washington, 243 U. S. 219, 238-239. Madera Sugar Pine Co. v. Industrial Accident Commission, 262 U. S. 488, 501-502.

The provisions of G. L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant. Whether the defendant shall avail itself of that [fol. 43] act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributory negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce. It was said touching this subject in Opinion of the Justices, 209 Mass. 607, at page 610:

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defences (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will

be beat for the 'good and welfare of this Commonwealth.' Const. Mass. c. 1, § 1, art. 4. See Missouri Pacific Railway v. Mackey, 127 U. S. 205; Minnesota Iron Co. v. Kline, 199 U. S. 593."

To the same effect are New York Central Railroad v. White, 243 U. S. 188, 200, and cases cited, and Silver v. Silver, 280 U. S. 117, 122. If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that "Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance." As [fol. 44] applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 445, 450. Interstate Busses Corp. v. Holyoke Street Railway, 273 U. S. 45. See cases collected in Commonwealth v. Peoples Express Co. 201 Mass. 564, at 578.

If the defendant is advised that the rules of the commissioner of insurance as at present framed do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies if on proper representation that official does not make rules just and legal in their operation on the defendant.

It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in re-

spect to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence it is not open to it.

The essential points of the case at bar, so far as they re- [fol. 45] late to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in New York Central Railroad v. White, 243 U. S. 188, and Hawkins v. Bleakly, id. 210.

Order dismissing report affirmed.

[fol. 46] Clerk's certificate to foregoing paper omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.